A YEAR IN REVIEW OF CANADIAN COMMERCIAL ARBITRATION CASE LAW (2022)

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I. INTRODUCTION

Every year, a handful of Canadian court decisions touching on commercial arbitration issues capture the interest and imagination of arbitration practitioners because these cases signify a new trend, clarify or change the law, raise novel principles, or just because they have surprising outcomes. This brief review presents a snapshot of the most "buzzworthy" decisions released in 2022. These cases highlight three main themes that emerged as key trends in 2022: (1) decisions binding non-signatories to arbitration agreements; (2) court reviews of tribunal preliminary jurisdiction rulings; and (3) a perennial topic with a new twist, appeals of arbitral awards on an extricable question of law.

II. BINDING NON-SIGNATORIES TO ARBITRATION

The year 2022 saw the release of several decisions by the Québec Superior Court that appeared to challenge the fundamental principle of arbitration as a consensual dispute resolution process. In each case, a non-signatory to an

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arbitration agreement was required to participate in an arbitration on grounds of practicality, even where consent to arbitrate was not clear. Although articles 1 and 622[1][2] of the *Code of Civil Procedure* require courts to refer a dispute to arbitration (only) where there is agreement to arbitrate,[1] the Court prioritized other legislative imperatives, such as the principle of proportionality, "in terms of the cost and time involved" found in article 2[2] and 622[3],[2] the avoidance of multiplicity of proceedings, and the risk of inconsistent results. In some cases, the Court went further, binding a non-signatory because it was "inappropriate" to split disputes and that doing so would be to rely upon a "blind technicality".

In *Newtech Waste Solutions Inc. v Asselin*,[3] the parties entered into a share purchase and sale agreement that contained an arbitration clause. The vendor started arbitration proceedings claiming he was owed an unpaid balance by the purchaser. The purchaser counterclaimed and alleged that the vendor was in breach of the agreement's non-competition clause. The Tribunal allowed the purchaser to add a non-signatory corporation as a party to the arbitration. The Québec Superior Court dismissed the non-signatory's challenge to this jurisdictional decision because it was alleged to have participated in the vendor's breach of contract and the vendor was its principal and shareholder—he was "the center of all this case".[4] The Court reasoned that the non-signatory should be joined because otherwise the Tribunal would have to consider the conduct of both the vendor and the non-signatory to decide the dispute, which could lead to contradictory results. It was "not appropriate to split the dispute, which would have the

[1] CQLR c C-25.01.

[2] *Ibid*.

[3] 2022 QCCS 3537 [*Newtech*].

[4] *Ibid* at para 25.

effect of multiplying the procedures, slowing them down or complicate the process".[5]

To identify circumstances that justify an exception to the general rule of consent, the Court relied on the 1996 Québec Court of Appeal decision in *Décarel inc. v Concordia Project Management*.[6] In that case, the Court found that the corporation which signed the arbitration agreement could only act through the instrumentality of its shareholders and managers, and that any dispute about the corporation's alleged wrongdoing could only arise from their conduct. Therefore, the arbitration agreement expressed their desire that any dispute was to be resolved by arbitration: "[t]o rule out the application of the arbitration clause in such circumstances on the grounds that it concerns only legal persons would, at least in my opinion, be nonsense based on blind technicality and knowingly ignorant of the particular circumstances of the case and this, regardless of the corporate veil in other contexts".[7] Adopting a rule in which each case should be decided on its own circumstances would help avoid the potential "absurd outcome" of contradictory findings by a court and an arbitral tribunal. The Court described this as a liberalization of earlier principles, which now allow each case to be decided based upon its own particular circumstances.[8]

Similarly, in *Cannatechnologie inc. v Matica Enterprises inc*., a non-signatory to an arbitration agreement was forced to arbitrate based upon the Court's finding of the presumed

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[5] *Newtech*, *supra* note 3 at para 27.

[6] 1996 CanLII 5747 (QCCA) [*Décarel*]. The Court in *Newtech* also relied upon other decisions of the Québec Court of Appeal to the same effect: *Société Asbestos Itée c. Lacroix*, 2004 CanLII 76694 (CA); *Société de cogénération de St-Félicien, société en commandite / St-Felicien Cogeneration Limited Partnership* c. *Falmec Industries Inc.*, 2005 QCCA 441; and a decision of the Québec Superior Court, *Cogismaq International inc. v Lafontaine,* 2007 QCCS 1214.

[7] *Ibid* at para 7.

[8] *Ibid* at paras 5—7.

intentions of the parties.[9] The plaintiff minority shareholder of a corporation sued, alleging oppression by the majority shareholder and its CEO/shareholder. The investment agreement pursuant to which the CEO purchased his shares from the majority shareholder contained an arbitration clause, to which the plaintiff shareholder was not a party; however, the plaintiff was a consultant to the corporation and participated in negotiating the investment agreement. The Québec Superior Court granted the defendants' application to dismiss the plaintiff's action and referred the parties, including the non-signatory plaintiff, to arbitration. It also referred all the claims to the same arbitration, although the Court acknowledged that some were outside the scope of the arbitration agreement. The Court found that it was, "reasonable to presume that—if the clause has no express limitation—the parties intended to refer all their related contractual matters to the arbitrator, in the interest of a single, neutral, efficient and competent dispute resolution mechanism, in order to avoid jurisdictional disputes and multiplicitous litigation".[10] The Court of Appeal reversed the dismissal of the action and ordered a stay to allow the arbitrator to determine the issue in accordance with the principle of competence-competence.[11] It concluded that, based upon a *prima facie* assessment of the evidence under article 622 of the *Civil Code of Procedure*, the record was sufficient to support the application of the arbitration clause to the plaintiff as a non-signatory.

Finally, in *Tessier v 2428-8516 Québec Inc.*,[12] the Québec Superior Court found that the "interests of justice, including the principle of proportionality" required closely linked parties and disputes to be arbitrated together.[13] It relied upon article 1[3] of the *Code of Civil Procedure*, which provides that, "[t]he parties

[9] 2021 QCCS 4249.

[10] *Ibid* at para 27 (internal quotation omitted).

[11] 2022 QCCA 758.

[12] 2022 QCCS 3159 [*Tessier*].

[13] *Ibid* at para 13.

must consider resorting to private means of preventing and resolving their dispute before going to court". The Court referred to arbitration disputes about the ownership of two companies, which operated together in the construction industry; both the applicants and the respondents claimed that they were the only shareholders of both companies. However, the shareholders of only one of the two companies were parties to a unanimous shareholders agreement that contained an arbitration clause. The Court found that the disputes were "intimately linked" and that it would be "inappropriate to split the actions"—and the parties agreed.[14] Instead, "rather than depriving the shareholders of the first [company, whose shareholders agreed to arbitration] of the effects of the arbitration clause, the shareholders of the second [company, whose shareholders did not] should be ordered to be subject to it".[15]

Compare these decisions to *Travelers Insurance Company of Canada v Greyhound Canada Transportation*,[16] where the Superior Court of Québec, Practice Division, declined jurisdiction over one part of the dispute which was not within the scope of the arbitration clause and which involved a non-signatory. The plaintiff lessor sued the lessee and its security services provider for losses it suffered on its premises as a result of an explosion. The lessee claimed that its security services provider was responsible and relied upon their contract, to which the plaintiff was not a party. It contained a warranty and indemnification provision, as well as an arbitration clause. The Court declined jurisdiction over the warranty claim because of the arbitration clause.[17] It recognized that this outcome would

[14] *Tessier, supra* note 12 at paras 11—12.

[15] *Ibid* at para 15.

[16] 2022 QCCQ 4746.

[17] The Court relied upon art 622 of the *Code of Civil Procedure,* CQLR c C-25, as well as the Supreme Court of Canada decision in *GreCon Dimter inc v JR Norman inc*, 2005 SCC 46, another warranty case. But compare this result to *Guns n' Roses Missouri Storm Inc v Donald K Donald Musical Productions Inc*, 1994 CanLII 5694 (QCCA).

result in parallel proceedings and possibly inconsistent results, but noted that the warranty claim involved different parties who had a clear intention to arbitrate.[18]

These cases suggest that the principle of consent to arbitration continues to hold where the non-signatories and signatories to the arbitration agreement are unrelated. Otherwise, where the dispute involves related corporations and their directors, officers, shareholders, or managers, all of which or whom operate business together under multiple contracts, these are circumstances which justify joining non-signatories to the arbitration to avoid multiplicity of proceedings and inconsistent results. However, it is unclear why the Québec Courts felt that the "liberalization" of the principles set out in *Décarel* is necessary. Well-established principles in contract and arbitration law are sufficient. For example, these cases could have been decided on the basis that a *prima facie* review of the evidence suggested that the non-signatories could be parties, with the result that the matters should be referred to the arbitrator. Alternatively, the Courts could have relied upon the principle of *alter egos* or piercing the corporate veil to achieve the same results.

A good example of this is the decision of *CC/Devas (Mauritius) Ltd. v Republic of India*,[19] which demonstrates the application of the *alter ego* principle. At first instance, the Québec Superior Court dismissed an application by Air India Ltd., a third party to an arbitration agreement, to quash an *ex parte* order permitting the seizure of its assets to satisfy a foreign arbitral award against its shareholder, the Republic of India. The Court cited the *alter ego* principle and referred to the "unique and extensive link" between the two entities and the fact that the Republic of India "exercises an exceptionally high degree of control over" Air India, a state-owned entity, which "goes way beyond the involvement and control normally

[18] Relying upon *Société québecoise des infastructures c WSP Canada Inc*, 2016 QCCA 1756.

[19] 2022 QCCS 7 [*CC/Devas*].

exercised by a shareholder over its wholly owned corporation".[20] The Québec Court of Appeal reversed this decision.[21] It referred to article 317 of the *Civil Code of Québec*, which allows the lifting of the corporate veil only where one corporation's separate legal personality is used to commit fraud, an abuse of rights, or contravention of a rule of public order for the benefit of the other corporation.[22] There was no such allegation here.

III. COURT REVIEW OF TRIBUNALS' PRELIMINARY RULINGS ON JURISDICTION

My 2021 year in review highlighted decisions in which courts considered their role on an application by a party to "decide the matter", where a tribunal "rules" on a jurisdiction objection as a preliminary question under article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") and comparable provisions of provincial domestic arbitration legislation.[23] The meaning of that language has continued to vex Canadian courts, even though it appeared that the 2021 decision of the Ontario Divisional Court in *Russian Federation v Luxtona* brought some clarity.[24]

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[20] *CC/Devas, supra* note 19 at para 62.

[21] 2022 QCCA 1264. It later granted a stay of this order at 2022 QCCA 1439, pending appeal to the Supreme Court of Canada, to prevent the assets from being moved beyond the jurisdiction of the Court.

[22] CQLR c CCQ-1991.

[23] Lisa C. Munro, "2021 Canadian Commercial Arbitration Case Law: A Year in Review", (2021) 2:2 Can J Comm Arb 71. Of course, this provision applies only where the arbitrator's ruling is truly jurisdictional. In *Optiva Inc v Tbaytel*, 2022 ONCA 646, the Court found that the arbitrator's ruling contained in a procedural order, that he had jurisdiction to hear a party's summary judgment motion over the objection of the other party, was a procedural matter, not jurisdictional (citing *Inforica Inc v GCI Information Systems and Management Consultants Inc*, 2009 ONCA 642).

[24] 2021 ONSC 4604 (Div. Ct.) [*Luxtona*].

That Court held that, consistent with the weight of international authority,[25] the language in the Model Law requiring the court to "decide the matter" confers original jurisdiction on the court and provides for a hearing *de novo*, at which new evidence may be adduced as of right. This result came after two lower court decisions, which had come to contradictory conclusions.[26] The Ontario Divisional Court's decision in *Luxtona* was applied to section 17(8) of the Ontario *Arbitration Act, 1991*[27] in *Hornepayne First Nation v Ontario First Nations (2008) Limited Partnership.*[28] However, it was not considered in *Saskatchewan v Capitol Steel Corporation,*[29] which came to a different conclusion under section 18(9) of the Saskatchewan *Arbitration Act, 1992*—that the procedure is an application for judicial review of the arbitrator's ruling, reviewable on a correctness standard.[30]

Courts remained divided on this issue in 2022, even in Ontario. In *Electek Power Services Inc. v Greenfield Energy Centre Limited Partnership,*[31] the Court held that *Luxtona* had established (under the Model Law) that applications to a court to "decide the matter" are hearings *de novo.* This also applies to the comparable provision in the Ontario *Arbitration Act, 1991.*[32] However, in *PCL Constructors Canada Inc. v Johnson Controls*, the Court came to a different conclusion.[33] The plaintiff, which had

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[25] The Court found that *Dallah Real Estate and Tourism Holding Inc v Ministry of Religious Affairs of the Government of Pakistan*, [2011] AC 763 (UKSC)[*Dallah*], is the leading international authority on this point, even though the UK is not a Model Law jurisdiction.

[26] 2018 ONSC 2419 (per Dunphy J) and 2019 ONSC 7558 (per Penny J).

[27] SO 1991, c. 17.

[28] 2021 ONSC 5534 at para 6.

[29] 2021 SKQB 224 at para 30.

[30] SS 1992, c. A-24.1.

[31] 2022 ONSC 894.

[32] *Ibid* at paras 20—22.

[33] 2022 ONSC 1642 at paras 18—24.

applied to the Court to "decide the matter" under the Ontario *Arbitration Act, 1991,* argued that the standard of review of the tribunals' rulings in two related arbitrations on a matter of jurisdiction was correctness. It relied upon one of the lower court decisions in *Luxtona*[34] (which had applied *Mexico v Cargill Incorporated*[35]). The Court agreed and found that the rulings of the arbitrators were correct. It does not appear that the Court was referred to the Ontario Divisional Court decision in *Luxtona,* which distinguished *Cargill* on the ground that it dealt with a set-aside application on jurisdictional grounds, not a challenge to the tribunal's jurisdiction.[36]

In Québec, the Court applied the *Luxtona* approach in *Newtech,*[37] in which the relevant language in art 632[3] of the *Code of Civil Procedure* provides that a party may request the court to "rule on the matter".[38]

Meanwhile, in Alberta, the 2022 case law was inconsistent. In *Ong v Fedoruk*,[39] the Court applied *Luxtona* to section 17(9) of the Alberta *Arbitration Act*.[40] It found that a *de novo* hearing better accords with the legislative direction that the courts are to "decide the matter".[41] It reasoned further that such actions attract a correctness standard because they involve "questions of law of central importance to the legal system as a whole and outside the [Arbitrator's] expertise".[42] On the other hand, the Court in *Brazeau (County) v Drayton Valley (Town)*

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[34] 2018 ONSC 2419 (per Dunphy J).

[35] 2011 ONCA 622 [*Cargill*].

[36] *Luxtona*, *supra* note 24 at para 23.

[37] *Newtech*, *supra* note 3.

[38] *CQLR*, *supra* note 1.

[39] 2022 ABQB 557 [*Ong*].

[40] RSA 2000 c A-43.

[41] *Ong*, *supra* note 39 at paras 32—37.

[42] *Ibid* at para 31.

characterized the proceeding before it under section 17(9) as an application for judicial review.[43]

Brazeau also considered the difference between a "ruling" and an "award". The question was whether a party was out of time to bring an "application for judicial review" of the arbitrator's preliminary jurisdiction ruling, which was released to the parties early, and also later attached to the final award on the merits. The relevant legislation pursuant to which the arbitration was conducted permits "judicial review" of an award within 60 days. The Court found that there was some ambiguity about whether an arbitrator's preliminary "ruling" constituted an "award". Neither term is defined in the Alberta *Arbitration Act* (or in other provincial domestic arbitration legislation which contains this same provision). The Court noted that the Alberta *Arbitration Act* gives the arbitrator the power to issue "awards" (sections 37, 38, and 41), while section 17 gives the arbitrator the power to make "rulings" on jurisdiction. Further, section 17 itself refers to both "rulings" and "awards". Section 17(8), in particular, states that the arbitral tribunal may "rule" on an objection to jurisdiction as a preliminary question when it is raised, or may deal with it in an "award". The Court reasoned that, as a matter of statutory interpretation, when the legislature uses different words, it intends different meanings. Therefore, the application to the court to "decide the matter" following an arbitrator's preliminary jurisdictional "ruling" must be made within 30 days after it is released, according to section 17(9). The appellant was out of time by waiting to challenge the "ruling" as part of an appeal of the final "award".

The distinction between a ruling and an award has implications beyond the narrow issue raised in *Brazeau*. In *Luxtona*, the Tribunal's preliminary jurisdiction decision was apparently called an "interim award".[44] Therefore, the applicant also sought to set aside the interim award under article 46 of the Model Law and, in so doing, preserve a further right of appeal

[43] 2022 ABQB 443 at para 50 [*Brazeau*].

[44] 2019 ONSC 7558 (per Penny J) at para 6.

on the jurisdiction issue. There is no right of appeal from the court's ruling on an application to "decide the matter".[45] This raises the possibility that the label used by the arbitrator may determine both the right and route of appeal. The Ontario Divisional Court in *Luxtona* did not address this issue, but in 2021 in *United Mexican States v Burr*, the Ontario Court of Appeal left open the possibility that a party can "ride both horses".[46]

The lack of consistency in these cases arises, in part, because of the conflation of several distinct concepts. The first is the nature of the court's jurisdiction and whether it is original or is a form of judicial review. The second is the appropriate standard of review. The third is the nature of the hearing and whether or not it is "*de novo*". The fourth, which turns on whether the hearing is *de novo*, is whether the record before the court is limited to that before the tribunal, or whether fresh evidence may be adduced, and, if so, as of right or only with leave. Without a clear analytical framework to understand these provisions in the Model Law and the domestic arbitration legislation, courts will likely continue to confuse these concepts and reach inconsistent outcomes, particularly if they start their analysis without the benefit of the case law in other jurisdictions, both national and international.

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[45] In *Iris Technologies Inc v Rogers Communications Canada Inc*, 2022 ONCA 634, the court quashed a "motion for leave to appeal" the lower court's decision in which it was asked to "decide the matter" of the tribunal's jurisdiction after it had made a preliminary ruling. The Court of Appeal found that the legislation is clear – s 17(9) of the Ontario *Arbitration Act, 1991*, expressly states that that "there is no appeal from the court's decision", at para 6, thereby affirming that Court's decision to the same effect under the Model Law in *United Mexican States v Burr*, 2021 ONCA 64.

[46] *Ibid* at paras 27—28.

IV. APPEAL OF AN ARBITRAL AWARD ON AN EXTRICABLE QUESTION OF LAW

One of the most talked-about decisions in 2022 was *Escape 101 Ventures Inc v March of Dimes Canada.*[47] The British Columbia Court of Appeal held that an arbitrator's material misapprehension of evidence going to the core of the outcome of the award constituted an extricable error of law, which was subject to appeal under section 59(2) of the British Columbia *Arbitration Act*.[48]

The parties' dispute arose out of an asset purchase agreement, pursuant to which the appellant sold to the respondent substantially all its business assets. The agreement provided for an "earnout" payment to be made to the appellant post-closing, based upon the business's gross revenue during a 5-year term. It required the respondent to deliver quarterly gross revenue reports, which the appellant was deemed to accept if it did not object in time. The parties disagreed on whether gross revenue from new business entered into after the sale was to be included in the earnout payment, and arbitrated their dispute. The arbitrator found that the agreement was ambiguous and considered the parties' post-contractual conduct as an aid to interpretation. He found that the appellant had failed to object in time to the absence of revenue from new business in several reports, which led him to conclude that the parties did not intend the agreement to include such revenue in the earnout payment calculation. The arbitrator dismissed the appellant's claim. It appealed directly to the British Columbia Court of Appeal, the first such appeal under British Columbia's new domestic *Arbitration Act*, which came into force in 2020.

The appellant argued that the arbitrator had misapprehended the evidence of its post-contractual conduct, which constituted an error of law since it was central to the

[47] 2022 BCCA 294 [*Escape 101*].

[48] SBC 2020, c 2.

arbitrator's reasoning and conclusions.[49] The parties agreed that the arbitrator had erred on the facts—he found that the appellant had failed to object to reports that did not disclose revenue with respect to a contract that would not take effect until the following year. The respondent's position was that *Sattva Capital Corp v Creston Moly Corp*[50] and *Teal Cedar Products Ltd v British Columbia*[51] narrowed the range of questions of law that may be raised on appeal of an arbitral award.

The Court of Appeal stated that *Sattva* and *Teal Cedar* concerned the analytical framework for drawing distinctions between questions of fact, of mixed fact and law, and of law alone. Neither decision suggested that a misapprehension of the evidence cannot be raised on appeal. In reaching this conclusion, the Court of Appeal referred to a series of appellate decisions (both pre- and post-*Sattva*) for the proposition that a misapprehension of evidence that goes to the core of the outcome is an extricable error of law, whether it be a failure to consider evidence relevant to a material issue, a mistake as to

[49] The question also arises as to whether the proceeding was properly framed as an appeal. The appellant's complaint was that the arbitrator had made findings that were not argued or pleaded by the parties. The respondent's position was that this issue ought to have been pursued as an application to the British Columbia Supreme Court to set aside the award on the ground that the applicant "was not given a reasonable opportunity to present its case or to answer the case presented against it" under s 58(1) of the British Columbia *Arbitration Act*. However, because this issue was raised for the first time in oral argument, the Court of Appeal declined to deal with it. In any event, the Court stated that the issue was academic because the appellant raised a question of law subject to appeal. See paras 25 to 32.

[50] 2014 SCC 53 [*Sattva*].

[51] 2017 SCC 32 [*Teal Cedar*].

the substance of the evidence, or a failure to give proper effect to the evidence.[52] The Court allowed the appeal.[53]

However, there are at least two good reasons to challenge the Court's analysis.

First, none of the cases the Court relied upon for this conclusion cited *Sattva* and none was a commercial contract interpretation case.[54] Further, none involved an appeal of an arbitral award or a consideration of the scope of such an appeal on an error of law (under the British Columbia *Arbitration Act*, or any other domestic arbitration legislation).[55]

Second, this decision is hard to reconcile with the *ratio* in *Sattva*, in particular the policy objectives of finality and deference to factual findings in arbitration that were espoused in that decision. *Sattva* very narrowly construed an extricable error of law that may arise in the contract interpretation process: the application of an incorrect principle; the failure to consider a required element of a legal test; or the failure to

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[52] *Sattva*, *supra* note 50 at para 43. See *Sharbern Holding Inc v Vancouver Airport Centre Ltd*, 2011 SCC 23 at para 71; *Armstrong v Armstrong*, 2012 BCCA 166 at paras 65—67; *Bayford v Boese*, 2021 ONCA 442 at para 28; *Carmichael v GlaxoSmithKline Inc*, 2020 ONCA 447 at para 125, leave to appeal to SCC refused, 39437 (1 April 2021); *R v Morrissey* (1995), 1995 CanLII 3498 (ONCA); and *Waxman v Waxman*, 2004 CanLII 39040 (ONCA).

[53] The Court also found that the language in s 59(1) of the BC *Arbitration Act*, which provides that an appeal may be brought "on any question of law arising out of an arbitral award", did not require the error to be clear on the face of the award. Here, the error was only clear upon a review of the evidence. See *Escape 101*, *supra* note 47 at paras 28, 78—96.

[54] See *supra* note 52.

[55] Elsewhere in the decision, the Court referred only to its own decisions that express the view, in *obiter*, that a misapprehension of the evidence could constitute an error of law on an appeal of an arbitral award: *Van de Perre v Edwards*, 2001 SCC 60 at para 15; *Hayes Forest Services Ltd v Weyerhauser Co Ltd*, 2008 BCCA 31 at para 69; *Grewal v Mann*, 2022 BCCA 30; and *Richmont Mines Inc v Tech Resources Limited*, 2018 BCCA at paras 71—74.

consider a relevant factor.[56] *Sattva* cautioned that courts must be careful to ensure that the proposed ground of appeal is properly characterized, given the statutory requirement to identify a question of law.[57] Finally, it explained why extricable errors of law rarely arise in contract interpretation cases:

> [55] … [T]he goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies… from an arbitrator's interpretation of a contract.[58]

The appellant's objections to the award did not fall within any of the categories of legal errors that may arise in interpretation identified in *Sattva*. The appellant's complaint was simply that the arbitrator had erred in making factual findings. The question on appeal was not whether the arbitrator was correct in using evidence of the parties' post-contract conduct to interpret their agreement. It was whether, having considered that evidence to interpret the contract, he misconstrued it. To paraphrase from *Teal Cedar*,[59] this was a question about whether the arbitrator properly applied a relevant principle—a question of mixed fact and law—rather than whether he applied the proper principle.

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[56] *Sattva*, *supra* note 50 at para 53.

[57] *Ibid* at para 54.

[58] *Ibid* at para 55.

[59] *Teal Cedar*, *supra* note 51 at para 65.

V. CONCLUSION

The decisions highlighted in this review are of interest because they address foundational arbitration principles—party autonomy, jurisdiction of the arbitral tribunal, and scope of court intervention—in surprising and sometimes perplexing ways.

The Québec decisions hold that non-signatories to arbitration agreements may be forced to arbitrate disputes involving closely related parties and intertwined disputes in order to avoid a multiplicity of parallel proceedings or based upon the presumption that such parties intended to have all their disputes determined in one forum. This is inconsistent with party autonomy.

Likewise, the parties in *Escape 101* chose arbitration under a legislative regime in which their only recourse against the award was either an appeal on a question of law or a set-aside application for procedural fairness issues.[60] In other words, it is arguable that both parties took the risk that their chosen arbitrator would make an error in finding facts that they would have no right of appeal.[61] Alternatively, and viewed in jurisdictional terms, the parties gave the Tribunal jurisdiction to find the facts, knowing there could be no court review. The Court's decision may have been an attempt to do justice between the parties where the arbitrator had made a material misapprehension of the evidence that had negative consequences for the appellant—it received only $402,311 of the potential maximum earnout payment of $1.1 million.[62] But if the Court had taken the party autonomy principle more

[60] Both the British Columbia *Arbitration Act, 1996*, RSBC 1996, c 55 (in effect when the parties made their agreement) and the *Arbitration Act, 2020*, SBC 2020, c 2 (in effect during the appeal) provided that a party may appeal on a question of law if the parties consent or if leave to appeal is granted.

[61] See *supra* note 52.

[62] This fact comes from the decision granting the appellant leave to appeal, 2021 BCCA 313 at para 3.

seriously, it may have viewed the situation as one in which the parties got exactly what they bargained for.

In addition, Canadian courts continue to struggle with basic concepts of jurisdiction when trying to interpret the language in arbitration legislation that, where a tribunal "rules" on an objection to the tribunal's jurisdiction as a preliminary question, a party may apply to the court to "decide the matter". The Ontario Divisional Court's decision in *Luxtona* provides a reasoned and reasonable approach. It followed the U.K. Supreme Court decision in *Dallah v Pakistan*,[63] which it found was the leading international authority. The U.K. Court found that its role was to "reassess the issue [of jurisdiction] itself", rather than review the Tribunal's decision. Put another way, "the tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority … at all".[64] Reference to U.K. case law is somewhat dubious given that England is not a Model Law jurisdiction, and the statutory language differs on this issue.[65] However, *Dallah* is consistent with the Ontario Court of Appeal decision of *Cargill*, decided in under the Model Law in another context.[66] Because the language in the Model Law is almost identical to that in the domestic legislation, it makes sense that a court reviewing a domestic award should follow *Luxtona*.[67]

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[63] *Dallah*, *supra* note 25.

[64] See *Luxtona*, *supra* note 24 at paras 30—31.

[65] See the English *Arbitration Act 1996*, 1996 c 23, s 32.

[66] *Cargill*, *supra* note 35.

[67] It may also be required as part of Canada's obligation to comply with international arbitration standards. This obligation is codified in Art 2A of the 2006 version of the Model Law, although only BC and Ontario have adopted those amendments into their provincial *International Commercial Arbitration Acts*.